Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(W)-1257–07 OF 2019
LAU BEE LAN, ABU BAKAR JAIS AND GUNALAN MUNIANDY JJCA
24 MAY 2021

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Civil Procedure — Trial — Procedure — Decision of High Court judge to strike out claim and subsequently retracted decision — Whether decision of High Court yet to be perfected and finalised subject to review by same judge — Whether High Court judge functus officio — Failure of parties to comply with court orders — Whether High Court judge could make orders due to non-compliance of orders

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Tort — Defamation — Libel — Statements made on Facebook — Whether disparaging statements amounted to libel and malicious falsehood — Whether statements sufficient to constitute defamation — Whether statements made for public consumption — Whether statements made in bad faith in attempt to destroy one's reputation and standing — Whether maliciously done without just cause and excuse — Whether claim for malicious falsehood proven

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This was an appeal by the appellant ('defendant') to the Court of Appeal against the High Court's decision in respect of a defamation and malicious falsehood claim filed by the respondents ('plaintiffs'). The defendant was in the business of distributing beauty products. The first plaintiff was in the business of marketing and selling beauty products under its own brands. The second plaintiff was the founder and chief executive officer of the first plaintiff. The defendant was also the distributor of the first plaintiff's products. The pleaded case of the plaintiffs was that disparaging statements amounting to libel and malicious falsehood were made by the defendant in the latter's Facebook about the plaintiffs' products. These statements included asserting that one particular product of the plaintiffs' was harmful to the skin. It was also alleged on Facebook by the defendant, according to the plaintiffs that the latter were more interested in profit than the safety of their products. The defendant in turn, in her statement of defence denied the allegations of the plaintiffs. In her counterclaim, the defendant stated that feedback from clients indicated that negative reactions were caused by using one of the plaintiffs' products, raising safety concerns regarding the use of the same. The plaintiffs, according to the defendant, thereafter had issued an email to the distributors, recalling the products from the market. Further, the products were later certified by the National Pharmaceutical Regulatory Agency to be unsafe and prohibited the sales of the same. The defendant prayed for damages, among others, for the loss of business. Initially the High Court judge ('the HCJ') struck out the claim by

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A the plaintiffs. The HCJ decided to do so because the plaintiffs failed to file an opening statement. The HCJ then annulled her own decision without any application by the plaintiffs and decided to allow the plaintiffs to make an oral opening statement and proceeded with the trial. The HCJ also decided to disallow the defendant to call witnesses because the defendant failed to provide
B a list of witnesses and failed to file witnesses' statements. At the end of the trial, the HCJ gave judgment for the plaintiffs. However, the HCJ did not write her grounds of judgment. Dissatisfied, the defendant appealed against the decision of the HCJ on the grounds that: (a) the HCJ was functus officio once the HCJ struck out the plaintiffs' claim; (b) the plaintiffs failed to prove their claim;
C (c) the HCJ erred in exercising her discretion pursuant to O 34 of the Rules of Court 2012 ('the ROC') in respect of the failure of both parties in adhering to instructions; and (d) the plaintiffs failed to translate the alleged defamatory statements to Bahasa Melayu.

D **Held**, ordering retrial:

(1) There was no written order drawn up, agreed, certified, sealed and perfected by the High Court regarding the decision of the HCJ. Since the order for the striking out was not perfected, the HCJ did not make a final
E order. As long as the order was not perfected, the HCJ was entitled to take a different stand from the one the HCJ initially did. It should, therefore follow, that there was no application needed from the plaintiffs to request that the striking out of the suit be annulled (see paras 12–14).

F (2) There were several statements made by the defendant in her Facebook that could be considered as defamatory. The statements were: (a) the plaintiffs' products were harmful to skin. Stop using it immediately; (b) they (plaintiffs) were more concerned with making money instead of solving problem; and (c) they (plaintiffs) were trying to fool me with their
G lies instead of solving problem. How dare they cheat dealers and customers. These statements were sufficient to constitute defamation. Since the statements made were in the defendant's Facebook, the same were for public consumption. Hence, the plaintiffs have proven their case for defamation (see paras 25–26).

H (3) The condition that the statements were published maliciously was not proven by the plaintiffs. The statements could not amount to being published maliciously because the defendant as a dealer was more concerned with the safety of the products on the customers. After all, the defendant was selling these products. In that sense, the defendant could
I not be said to have had bad faith and was hell-bent in trying to destroy the plaintiffs' reputation and standing. That element of being 'malicious' per se was not present based on the facts of the case. The defendant could not be harbouring ill-will or an evil motive against the plaintiffs. The relationship between the plaintiffs and defendant as a dealer of their

products was established for some time. They were in a business relationship which was mutually beneficial to both parties (see paras 30 & 32).

(4) It was difficult to say that the defendant's acts were maliciously done without just cause or excuse. This fact should not hastily be determined or decided when the defendant had been instructed not to call witnesses. Without witnesses, it could not be said that the defendant had with intent acted maliciously without just cause and excuse. The witnesses if allowed to be called, might well prove there was never a malicious act without just cause or excuse by the defendant. Therefore, the plaintiffs' claim for malicious falsehood had not been proven (see paras 34–35).

(5) The HCJ could make any orders which the HCJ thought fit in the event her directions were not complied with. When the defendant was instructed to file a list of witnesses and witnesses' statements, she failed to comply with that direction. The HCJ was therefore, at liberty to make the order that the defendant should be prevented from calling her witnesses in the trial. However, such decision must be contrasted with the HCJ's decision to strike out the plaintiffs' claim and then annulling that decision without the application of the plaintiffs themselves. Similarly, like the defendant, the plaintiffs also had disobeyed the instruction of the court to file an opening statement. Unfortunately, the HCJ treated the same fault of not adhering to instructions differently between the plaintiffs and defendant. It would have been more appropriate and fair for the HCJ to have allowed the defendant to call witnesses in this case. The decision of the HCJ not to allow the defendant to call witnesses was both inappropriate and unfair. The HCJ also did not write her grounds of judgment. The HCJ was unfair and prejudicial to the plaintiffs and defendant. Without the grounds, it was difficult to hear the appeal effectively. In the interest of justice and considering the circumstances of this case, this court ordered a retrial of the plaintiffs' claim and the defendant's counterclaim (see paras 38–39 & 54–55).

(6) In the 'pernyataan tuntutan terpinda', the plaintiffs did not translate the alleged defamatory statements into Bahasa Melayu. Considering the statutory provisions and case law authorities, this was fatal against the plaintiffs (see para 52).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu (defendan) ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi berkaitan dengan satu fitnah dan tuntutan kepalsuan niat jahat yang difailkan oleh responden (plaintif). Defendan berada dalam perniagaan pengedaran produk kecantikan. Plaintif pertama berada dalam perniagaan pemasaran dan penjualan produk kecantikan dibawah jenama mereka sendiri. Plaintif kedua merupakan pengasas dan ketua

A pengarah eksekutif plaintif pertama. Defendan juga merupakan pengedar produk plaintif pertama. Kes yang diplidkan oleh plaintif adalah bahawa kenyataan meremehkan terjumlah kepada libel atau kepalsuan niat jahat dibuat oleh defendan di Facebook berkaitan dengan produk plaintif. Pengataan ini termasuklah menyatakan bahawa satu produk plaintif B mendatangkan keburukan kepada kulit. Ianya juga dikatakan di Facebook oleh defendan, menurut plaintif bahawa mereka lebih berminat untuk membuat keuntungan dan bukannya keselamatan produknya. Defendan pula, dalam penyataan pembelaannya menafikan pengataan plaintif. Dalam tuntutan balasnya, defendan menyatakan bahawa maklum balas daripada klien C menunjukan bahawa mereka mendapat tindak balas negatif yang disebabkan daripada menggunakan salah satu produk plaintif, yang menimbulkan kerisauan keselamatan berkaitan dengan penggunaannya. Menurut defendan, plaintif kemudiannya telah mengeluarkan satu emel kepada pengedarnya, D memanggil semula produk tersebut daripada pasaran. Lanjutan itu, produk tersebut kemudiannya diakui oleh Bahagian Regulatori Farmasi Negara sebagai tidak selamat dan melarang penjualannya. Defendan memohon untuk ganti rugi, antara yang lain, untuk kerugian perniagaan. Pada mulanya, hakim Mahkamah Tinggi ('HMT') membatalkan tuntutan plaintif. HMT membuat E keputusan sedemikian kerana plaintif gagal untuk memfailkan penyataan pembukaan. HMT kemudiannya membatalkan keputusannya sendiri tanpa apa-apa permohonan daripada plaintif dan memutuskan untuk membenarkan plainitif untuk membuat penyataan pembukaan dan menjalankan perbicaraan. HMT juga membuat keputusan untuk tidak membenarkan F defendan untuk memanggil saksi kerana defendan gagal untuk menyediakan senarai saksi dan gagal untuk memfailkan penyataan saksi. Di akhir perbicaraan, HMT membuat keputusan memihak kepada plaintif. Namun, HMT tidak menulis alasan penghakimannya. Terkilan, defendan memfailkan rayuan terhadap keputusan HMT atas alasan: (a) HMT telah functus officio G apabila HMT tersebut membatalkan tuntutan plaintif; (b) plaintif gagal untuk membuktikan tuntutannya; (c) HMT terkhilaf dalam melaksanakan budi bicaranya dibawah A 34 Kaedah-Kaedah Mahkamah 2012 ('KKM') berkaitan dengan kegagalan kedua-dua pihak untuk mematuhi arahan; dan (d) plaintif gagal untuk menterjemahkan pengataan fitnah kepada Bahasa Melayu.

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Diputuskan, memerintahkan perbicaraan semula:

(1) Tiada perintah bertulis telah dibuat, dipersetujui, diakui, dimeterai dan dilengkapkan oleh Mahkamah Tinggi berkaitan dengan keputusan HMT. Memandangkan perintah pembatalan tidak dilengkapkan, HMT I tidak membuat perintah akhir. Selagi mana perintah tidak dilengkapkan, HMT berhak untuk membuat pendirian berbeza daripada apa yang HMT telah membuat pada mulanya. Oleh yang demikian, tiada permohonan diperlukan oleh plaintif untuk memohon pembatalan guaman tersebut dibatalkan (lihat perenggan 12–14).

(2) Wujud beberapa pengataan yang dibuat oleh defendan di Facebook miliknya yang boleh dianggap sebagai fitnah. Pengataan sedemikian adalah: (a) produk plaintif mendatangkan keburukan kepada kulit. Berhenti menggunakannya dengan segera; (b) mereka (plaintif) lebih mementingkan membuat keuntungan dan bukannya untuk menyelesaikan masalah; dan (c) mereka (plaintif) cuba untuk menipu saya dengan penipuan mereka dan bukannya untuk menyelesaikan masalah. Berani mereka menipu pengedar dan pelanggan. Pengataan ini memadai untuk terjumlah kepada fitnah. Memandangkan pengataan ini dibuat di Facebook milik defendan, ianya adalah untuk tatapan umum. Oleh yang demikian, plaintif telah membuktikan kesnya untuk saman fitnah (lihat perenggan 25–26).

(3) Keadaan di mana pengataan tersebut diterbitkan dengan niat jahat tidak dibuktikan oleh plaintif. Pengataan tersebut tidak boleh dikatakan diterbitkan dengan niat jahat kerana defendan sebagai pengedar lebih merisaukan keselamatan produk kepada pelanggan. Lagipun, defendan menjual produk ini. Dalam keadaan sedemikian, defendan tidak boleh dikatakan mempunyai niat curang dan berniat untuk memusnahkan nama baik plaintif. Element niat jahat tidak wujud berdasarkan fakta kes. Defendan tidak boleh menyimpan niat jahat terhadap plaintif. Hubungan antara plaintif dan defendan sebagai pengedar produk mereka telah wujud untuk satu tempoh masa. Mereka berada dalam hubungan perniagaan yang menguntungkan kedua-dua pihak (lihat perenggan 30 & 32).

(4) Ia adalah sukar untuk mengatakan bahawa tindakan defendan berniat jahat tanpa sebab yang adil. Fakta ini tidak harus diputuskan secara segera apabila defendan diperintahkan untuk tidak memanggil saksi. Tanpa saksi ia tidak boleh dikatakan bahawa defendan telah bertindak dengan niat jahat tanpa alasan munasabah. Sekiranya saksi dibenarkan untuk dipanggil, mungkin akan membuktikan bahawa tiada tindakan jahat tanpa sebab adil atau alasan oleh defendan. Oleh yang demikian, tuntutan plaintif untuk kepalsuan jahat tidak dibuktikan (lihat perenggan 34–35).

(5) HMT boleh membuat apa-apa perintah yang mana HMT fikirkan sesuai dalam keadaan perintahnya tidak dipatuhi. Apabila defendan diperintahkan untuk memfailkan senarai saksi dan penyataan saksi, beliau gagal untuk berbuat sedemikian. Oleh yang demikian, HMT bebas untuk membuat perintah bahawa defendan dihalang daripada memanggil saksinya sewaktu perbicaraan. Namun, keputusan sedemikian harus dibandingkan dengan keputusan HMT untuk membatalkan tuntutan plaintif dan kemudiannya membatalkan keputusan tersebut. Plaintif, seperti defendan, gagal untuk mematuhi perintah mahkamah untuk memfailkan penyataan pembukaan.

Malangnya, HMT menangani kesilapan tidak mematuhi arahan mahkamah tersebut secara tidak sama antara plaintif dan defendan. Ianya lebih sesuai dan adil sekiranya HMT membenarkan defendan untuk memanggil saksi dalam kes ini. Keputusan HMT untuk tidak membenarkan defendan memanggil saksi adalah tidak sesuai dan tidak adil. HMT juga tidak menulis alasan penghakiman. HMT tidak adil dan memprejudiskan plaintif dan defendan. Tanpa alasan penghakiman, adalah sukar untuk mendengar rayuan secara berkesan. Dalam mengambil kira kepentingan keadilan dan mengambil kira keadaan kes ini, mahkamah ini memerintahkan perbicaraan semula tuntutan plaintif dan tuntutan balas defendan (lihat perenggan 38–39 & 54–55).

(6) Dalam penyataan tuntutan terpinda, plaintif tidak menterjemahkan pengataan yang dikatakan fitnah tersebut ke Bahasa Melayu. Mengambil kira peruntukan statutori dan otoriti kes undang-undang, ini adalah fatal terhadap plaintif (lihat perenggan 52).]

Cases referred to

Abu Hassan bin Hasbullah v Zukeri bin Ibrahim [2018] 6 MLJ 396; [2018] 3 CLJ 726, CA (folld)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (folld)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad [2010] 2 MLJ 41, CA (refd)

Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors [1997] 5 MLJ 523, HC (refd)

Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee [2019] 3 MLJ 720; [2019] 3 CLJ 729, FC (refd)

SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd [2008] 4 MLJ 187, CA (refd)

Vellasamy a/l Ponnusamy & Ors v Gurbachan Singh a/l Bagawan Singh & Anor [2020] MLJU 695; [2020] 7 CLJ 512, CA (refd)

Legislation referred to

Federal Constitution arts 8, 152
Interpretation Acts 1948 and 1967 s 3
National Language Act 1963/67 s 8
Rules of Court 2012 O 34, O 34 r 1, O 92 r 1, 1(4)(b)

Appeal from: Civil Suit No WA-23NCvC-29–09 of 2017 (High Court, Kuala Lumpur)

Mohd Rizal bin Yaakub (Mohd Firdaus bin Hamzah and Shaik Abdullah bin Abdul Malik with him) (Shaik Jireh Rizal) for the appellant.

Gurdev Singh a/l Jagjit Singh (Esther Ong, Tengku Saiful & Sree) for the respondents.

Abu Bakar Jais JCA:

INTRODUCTION

[1] The appeal by the appellant ('defendant') to the Court of Appeal is against the High Court's decision in respect of a defamation and malicious falsehood claim filed by the respondents ('plaintiffs'). The appeal also relates to two specific actions of the learned High Court judge ('HCJ') regarding procedure in handling the case to its conclusion. First, in striking out the respondents' claim and then retracting it. The other in not allowing the appellant to call witnesses.

[2] As both parties had waited sometime without avail for the written grounds of judgment of the learned HCJ and since she has since retired, we proceeded hearing the appeal without the benefit of the same. At the end of the appeal, we were obliged to consider whether a retrial should be ordered. Parties hereafter will be referred to as they were in the High Court.

BACKGROUND FACTS

[3] The defendant is in the business of distributing beauty products. The first plaintiff is in the business of marketing and selling beauty products under its own brands. The second plaintiff is the founder and chief executive officer of the first plaintiff. The defendant was also the distributor of the first plaintiff's products.

[4] The pleaded case of the plaintiffs is that disparaging statements amounting to libel and malicious falsehood were made by the defendant in the latter's Facebook about the plaintiffs' products. These statements include asserting that one particular product of the plaintiffs' was harmful to the skin and the same was actually a mixture of another product by one manufacturer in Pakistan. It was also alleged in the Facebook by the defendant, according to the plaintiffs that the latter were more interested in profit than the safety of their products.

[5] The defendant in turn, in her statement of defence denied the allegations of the plaintiffs. In her counterclaim, the defendant stated that feedback from clients indicated that negative reactions were caused by using one of the plaintiffs' products, raising safety concerns regarding the use of the same. The plaintiffs, according to the defendant, thereafter had to issue an email to the distributors, recalling the products from the market. Further, the

products were later certified by the National Pharmaceutical Regulatory Agency to be unsafe and prohibited the sales of the same. The plaintiffs later issued another email saying they would launch a better product with a security verification system. Attempts by the defendant to discuss the matter with the second plaintiff were unsuccessful as the latter continued not to provide clarification. The defendant prayed for damages, among others, for the loss of business.

AT THE HIGH COURT

[6] Initially the learned HCJ struck out the claim by the plaintiffs. She decided to do so because the plaintiffs failed to file an opening statement. She then annulled her own decision without any application by the plaintiffs. Thereafter, she decided to allow the plaintiffs to make an oral opening statement and proceeded with the trial.

[7] She also decided to disallow the defendant to call witnesses because the defendant failed to provide a list of witnesses and failed to file witnesses' statements.

[8] At the end of the trial, the learned HCJ gave judgment for the plaintiffs. However, as stated, the learned HCJ did not write her grounds of judgment. As such, there is no way of knowing the reasons supporting her judgment.

GROUNDS OF APPEAL

[9] Before us, the defendant decided to pursue and argue only four grounds of appeal, instead of the 16 grounds listed in the memorandum of appeal. The four grounds are as follows:

(a) the learned HCJ was functus officio once she struck out the plaintiffs' claim;

(b) the plaintiffs failed to prove their claim;

(c) the learned HCJ erred in exercising her discretion pursuant to O 34 of the Rules of Court 2012 ('the ROC') in respect of the failure of both parties in adhering to instructions; and

(d) the plaintiffs failed to translate the alleged defamatory statements into Bahasa Melayu.

OUR DECISION

[10] Having regard to the election of the appellant only to submit on the four grounds of appeal, our decision is accordingly addressed based on the issues as follows.

Whether the learned HCJ was functus officio when she struck out the plaintiffs' claim

[11] Having struck out the plaintiffs' claim, the defendant submitted the learned HCJ could not and should not have annulled her decision and proceeded to hear the same. She was functus officio and the plaintiffs' case should have ended at that stage according to the defendant. In any event, there was no application or appeal by the plaintiffs against that decision of the learned HCJ. The defendant further contended the learned HCJ therefore could not simply annul her own decision and reinstate the same and dispose the hearing of the case for full trial.

[12] With regard to this submission, first, there is no dispute there was no written order drawn up, agreed, certified, sealed and perfected by the High Court regarding this decision of the learned HCJ. Since the order for the striking out was not perfected, the learned HCJ did not make a final order which she could not change at that stage. By analogy, we are guided in deciding this by the Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 where it states as follows:

> *When a judgment in the High Court has been perfected in the manner described in the above passage, a party to the judgment generally and subject to the same passage, or any other written law, and apart from any appeal, cannot reopen the matter finalized in the judgment by seeking to alter it or amend it for the court would be functus officio by virtue of the ratio of Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation (see *Isaacs v Robertson* [1985] AC 97; *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601). (Emphasis added.)

[13] The above judgment of the apex court is suggestive that a High Court's decision not yet perfected is still subject to review by the same judge as the order is yet to be finalised. Therefore, we do not agree with the defendant that the learned HCJ in our present case could not change her mind not to strike out the plaintiffs' claim. As long as the order is not perfected, she is entitled to take a different stand from the one she initially did.

[14] It should, therefore follow, that there is no application needed from the plaintiffs to request that the striking out of the suit be annulled. There is nothing to be retracted as there was no final decision made by the learned HCJ then, since no order has been perfected with respect to the striking out of the plaintiffs' claim.

Whether the plaintiffs had failed to prove their claim

[15] As stated, there are two parts of the claim of the plaintiffs. One is regarding defamation, specifically libel. The other is malicious falsehood.

[16] In respect of both, what is crucial to consider is the fact that the defendant was ordered by the learned HCJ not to call witnesses. That includes the defendant herself in defending the case. This came about because the learned HCJ was not satisfied with the defendant's failure to provide a witness list prior to full trial and also witnesses' statements.

[17] Be that as it may, the plaintiffs still would need to prove their case. The defendant may not call any witnesses but the plaintiffs still have the duty to prove their case on the balance of probabilities.

[18] Towards ascertaining this objective, first, it would be fitting to note the difference between proving libel and malicious falsehood since these two actions as explained are filed by the plaintiffs. The difference is explained in the Court of Appeal case of *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 187 as follows:

> [26] Malicious falsehood and libel are distinct torts. In malicious falsehood the burden of proof that the words are false is on the plaintiff. Whereas in libel the plaintiff does not have to prove that the statement is false, for the law presumes that in his favour. In *Drummond-Jackson v British Medical Association and others* [1970] 1 All ER 1094, at p 1099 Lord Denning MR said:
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> > These two actions [of libel and malicious falsehood] must be kept distinct. They have very different consequences. In libel the law presumes everything against the writer; the words presumed to be false and malicious; and it is for the writer to prove, if he can, that the words were true and the comment was fair, or otherwise make good his defence. But in malicious falsehood the boot is on the other foot. The writer is presumed to be acting honestly and without malice; and it is for the plaintiff to prove, if he can, that the words were written by the defendant falsely and maliciously and were calculated to damage the plaintiff in his calling.
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> [27] Similarly, in *Derbyshire County Council v Times Newspapers Ltd & Ors* [1992] 3 All ER 65; [1992] QB 770, at p 81, Balcombe LJ said:
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> > The distinction between the torts of defamation and malicious falsehood is

conveniently summarised in *Duncan and Neill on Defamation* (2nd Ed 1983) para 2.03. The essential differences are: (1) the shift in the burden of proof: in defamation the defendant has to prove that the defamatory words were true; in malicious falsehood the plaintiff must prove that the words are false; (2) in an action for malicious falsehood the plaintiff has to prove malice as part of his cause of action; this is not so in the case of defamation.

[19] While in respect of libel as part of defamation, it would be appropriate to highlight the elements of defamation. This is well illustrated by the judgment of our learned sister Asmabi Mohamad JCA (as she then was) in the Court of Appeal case of *Abu Hassan bin Hasbullah v Zukeri bin Ibrahim* [2018] 6 MLJ 396; [2018] 3 CLJ 726 as follows:

[36] In a defamation case, the learned judge has a duty to rule on the three essential ingredients of the tort of defamation before he proceeds to decide on the defences pleaded by the defendant in his defence. *Firstly, the learned judge ought to determine if the impugned emails were capable of bearing the defamatory meaning as ascribed in para 9 of the SOC. Secondly, the learned judge ought to examine if the impugned emails referred to the plaintiff. Lastly, the learned judge ought to have resolved if the impugned emails were published to a third person.*

(see *Ayob bin Saud v Ts Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152; [1989] 1 CLJ Rep 321) *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b; [1964] 1 LNS 2; *Kian Lup Construction v Hong Kong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32; *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; [1973] 1 LNS 146; *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304; *Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor* [2007] MLJU 894; [2008] 2 CLJ 814). (Emphasis added.)

[20] Guided by the above decision, the three elements required in our present case for defamation are listed as follows:

(a) the statements made by the defendant must bear a defamatory meaning;

(b) the statements refer to the plaintiffs; and

(c) the statements were published to a third person.

[21] In respect of the second element, it has been agreed in the agreed facts by both parties that the statements were made with regard to the plaintiffs' products. While for the third element, it has also been agreed in the agreed facts that the statements were published in the defendant's Facebook. Therefore, what remains to be determined is whether the statements are defamatory in nature.

[22] In this respect, the leading textbook *Gatley on Libel and Slander* (9th Ed, 1998) states as follows:

A What is defamatory. There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly influential: (1) Would the imputation tend to 'lower the plaintiff in the estimation of right-thinking members of society generally'? (2) Would the imputation tend to cause others to shun or avoid the plaintiff? and (3) Would the words tend to expose the plaintiff to 'hatred, B contempt or ridicule'?

[23] While in the Court of Appeal case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461 it is said as follows:

C ... the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

D **[24]** Thus, having in mind the quotations above, would the statements made by the defendant in this case lower the plaintiffs in the estimation of right-thinking members of society in general? Would the statements impute dishonourable conduct on the part of the plaintiffs?

E **[25]** There are several statements made by the defendant in her Facebook that could be considered as defamatory having regard to what is explained by the textbook and case law as highlighted above. The statements are as follows:

(a) the plaintiffs' products are harmful to skin. Stop using it immediately;

F (b) they (plaintiffs) are more concerned with making money instead of solving problem; and

(c) they (plaintiffs) are trying to fool me with their lies instead of solving problem. How dare they cheat dealers and customers?

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[26] There are other statements made. However, the above would be sufficient to constitute defamation having regard again to the textbook and case law alluded to earlier. Since the statements made were in the defendant's Facebook, the same were for public consumption. Hence, the plaintiffs have H proven their case for defamation.

[27] What about malicious falsehood? Have the plaintiffs proven their case for this tort? As noted by the Court of Appeal case of *SV Beverages* which was referred earlier, for this tort, the burden is on the plaintiffs to prove the I statements are false. It is more onerous for the plaintiffs to prove this tort (see the case *SV Beverages* above).

[28] It is also relevant to note that the Federal Court in the case of *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh*

Lee [2019] 3 MLJ 720; [2019] 3 CLJ 729 laid down three conditions in proving malicious falsehood as follows:

> [39] In order to establish a claim under malicious falsehood, it is trite law that
>
> the plaintiff bears the burden of proving the following elements:
>
> (i) that the defendant published about the plaintiff words which are false;
>
> (ii) that the words were published maliciously; and
>
> (iii) that special damage followed as the direct and natural result of the publication.
>
> (see: *Tan Chong & Son Motor Co Sdn Bhd v Borneo Motors (M) Sdn Bhd & Anor* [2001] 3 MLJ 140; [2001] 4 CLJ 296; *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529; [1999] 8 CLJ 499; *Kaye v Robertson* [1991] FSR 62).

[29] Thus, besides proving the statements were false, the plaintiffs must also prove the statements were published maliciously and special damage arose directly from such statements. Further, reading the passage above, all three conditions must also be proven collectively and proving just one or two of the conditions would not be sufficient.

[30] We are of the view, at least, the condition that the statements were published maliciously was not proven by the plaintiffs. The statements could not amount to being published maliciously because the defendant as a dealer was more concerned with the safety of the products on the customers. After all, the defendant was selling these products. In that sense, the defendant could not be said to have had bad faith and was hell-bent in trying to destroy the plaintiffs' reputation and standing. That element of being 'malicious' per se is not present based on the facts of the case. Besides, at least, in the statements of defence, the defendant did try to contact the second plaintiff to discuss the products further. However, this did not happen as the second plaintiff said he will get back to the defendant in due course.

[31] Furthermore, proving the defendant was being malicious would entail greater effort as suggested by *Raub Australian Gold Mining*. In this regard, the apex court explains as follows:

> [40] 'Malice' has been judicially interpreted by the courts as being reckless, unreasonable, prejudice or unfair belief in the truth of the statement. 'Malice' may be established by showing that the defendant did not believe in the truth of what he uttered (see: *Horrocks v Lowe* [1974] 1 All ER 662 and *Watt v Longsdon* [1930] 1 KB 130 at p 154; [1929] All ER Rep 284 at p 294).
>
> [41] As defined in the *Osborn's Concise Dictionary* (7th Ed), the word 'malice' means:

A Ill-will or evil motive: personal spite or ill-will sometimes called actual malice, express malice or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v Lowe* [1972] 1 WLR 1625).

B [42] In law, an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, 'malice' cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (see: *Anne Lim Keng See v The New Staits Times Press (M) Bhd & Anor* [2008] 3 MLJ 492; [2008] 6 CLJ 697, *Horrocks v Lowe*.)

C

[32] Having regard to the passages shown, with respect, we could not say that the matters explained by the Federal Court above have been proven by the plaintiffs. For instance, the defendant could not be harbouring ill-will or evil motive against the plaintiffs. The relationship between the plaintiffs and defendant as a dealer of their products has been established for some time. They were having a business relationship which was mutually beneficial to both parties. To say that there was an evil motive on the part of the defendant is simply not proven based on the facts of this case. What good will it do to the defendant for her to have an evil motive when the business between her and the plaintiffs had been profitable to both, at least up to a certain point? They were not rivals or in competition.

[33] On top of that, as pointed out by the apex court above, in law, an act is malicious if done intentionally without just cause or excuse. It is also said, so long as a person believes in the truth of what he says and is not reckless, 'malice' cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair. These statements of the Federal Court might well exonerate the defendant's action.

[34] In any event it is difficult to say that the defendant's acts were maliciously done without just cause or excuse. This fact should not hastily be determined or decided when the defendant has been instructed not to call witnesses. Without witnesses, it could not be said that the defendant had with intent acted maliciously without just cause and excuse. The witnesses if allowed to be called, might well prove there was never a malicious act without just cause or excuse by the defendant.

[35] With respect, based on the reasons aforesaid, we find that the plaintiffs' claim for malicious falsehood had not been proven.

Whether the learned HCJ erred in exercising her discretion pursuant to O 34 of the ROC in respect of the failure of both parties in adhering to instructions

[36] In respect of this issue, as stated the learned HCJ decided two things: A

(a) striking out the plaintiffs' claim and then cancelling that decision; and

(b) not allowing the defendant to call witnesses for the full trial.

[37] In this regard, it is relevant and important to note that O 34 r 1 of the ROC states as follows: B

> 1 Orders and directions for just, expeditious and economical disposal of proceedings (O 34 r 1)
>
> (1) Notwithstanding anything in these rules, the court may, at any time after the commencement of proceedings, of its own motion, direct any party or parties to the proceedings to appear before the court, in order that the court may make such order or give such direction as it thinks fit so that — C
>
> (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and D
>
> (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof. E
>
> (2) *Where the court makes orders or gives directions under para (1), the court may take into account whether or not a party has complied with any relevant pre-action protocol or practice direction for the time being issued.*
>
> (3) *Where any party fails to comply with any order made or direction given by the court under para (1), the court may dismiss the action, strike out the defence or counterclaim or make such other order as it thinks fit.* F
>
> (4) The court may, in exercising its powers under para (1), make such order as to costs as it thinks fit.
>
> (5) Any judgment, order or direction given or made against any party who does not appear before the court when directed to do so under para (1) may be set aside or varied by the court on such terms as it thinks just. (Emphasis added.) G

[38] By virtue of the above, the learned HCJ can make any orders she thinks fit in the event her directions were not complied with. When the defendant was instructed to file a list of witnesses and witnesses' statements, she failed to comply with that direction. The learned HCJ was therefore, at liberty to make the order that the defendant should be prevented from calling her witnesses in the trial, having regard to the provision above. H I

[39] However, her decision above, must be contrasted with her decision to strike out the plaintiffs' claim and then annulling that decision without the application of the plaintiffs themselves. Similarly, like the defendant, the

plaintiffs also had disobeyed the instruction of the court. As stated earlier, the instruction was for the plaintiffs to file an opening statement. On one hand, the learned HCJ chose to be very strict with the defendant but on the other, she apparently forgave the plaintiffs for disobeying the instruction to file the opening statement. What is sauce for the goose must be sauce for the gander. Unfortunately, with respect, the learned HCJ treated the same fault of not adhering to instructions differently between the plaintiffs and defendant.

[40] Furthermore, the learned HCJ's different approach with regard to the defendant compared to the plaintiffs, had caused the defendant to defend the case without witnesses. This is undoubtedly a tall order against the defendant. Obviously, the defendant is greatly handicapped in defending the plaintiffs' claim and proving her own counterclaim when she was ordered not to call any witnesses, which means, including herself. It is also relevant to note that the direction given to the defendant to file the list of witnesses and witnesses' statements was not even an 'unless order'.

[41] It would have been more appropriate and fair for the learned HCJ to have allowed the defendant to call witnesses in this case. After all, everyone is equal before the law and entitled to the equal protection of the same, which is a fundamental right provided by art 8 of our Federal Constitution. There is no doubt the learned HCJ is empowered by O 34 r 1 of the ROC to make the order against the defendant restraining her from calling witnesses because of the latter's failure to file the list of witnesses and witnesses' statements. However, since the learned HCJ had been lenient on the plaintiffs, she should have exercised her discretion judicially and extended the same discretion to the defendant.

[42] The High Court too would have been in a better position to decide the merits of the case if both the parties had been allowed to call witnesses. With respect, the defendant's overall contentions and oral testimonies for the plaintiffs' claim and her own counterclaim could not have been considered properly and thoroughly by the learned HCJ because the defendant was deprived of calling her witnesses. In addition, the plaintiffs themselves could not have been prejudiced had the defendant been allowed to call witnesses.

[43] After all, our learned brother, Hamid Sultan Abu Backer JCA in *Vellasamy a/l Ponnusamy & Ors v Gurbachan Singh a/l Bagawan Singh & Anor* [2020] MLJU 695; [2020] 7 CLJ 512 has emphasised the overriding duty of the courts to ensure justice in the operation of the ROC as follows:

> [13] The overriding objective of RC 2012 requires court to condone non-compliance. Learned authors Janab's *Key To Civil Procedure*, (6th Ed), revised by Dato' Mah Weng Kwai and Arun Kasi make the following observations at pp 152–153:

(b) Overriding Objective

One of the important principles entrenched in CPR 1998 in England is the concept of 'overriding objective' which is to deal with cases justly. The court has to give effect to the overriding objective in all stages of proceedings, inclusive of decision-making process and when interpreting the rules. This concept requires the judge to actively manage the case from the time of commencement.

...

The primary function of the courts from time immemorial is to dispense justice. Where courts decline to hear cases on merits but are inclined to dismiss cases on technicalities then the primary purpose for the courts' existence is defeated. The English courts in applying principles of 'overriding objective' enunciated in CPR 1998 had condoned technical as well as procedural breaches. In *Jones v Telford* (The Times, 29 July 1999), the Court of Appeal stated that the court must not lose sight of the fact that its primary concern is to dispense justice. In this case, service had been delayed beyond the period of validity. The reason was that the plaintiff's solicitor had difficulties in obtaining psychiatric reports for service with the particulars of claim. The Court of Appeal upheld an extension of time (see *Chilton v Surrey County Council* [1999] LTL 24/6/99; *Carla Homes (South) Ltd v Chichester District Council*, The Times, 15th October 1999).

Whether the plaintiffs failed to translate the alleged defamatory statements into Bahasa Melayu

[44] There is no dispute the alleged defamatory statements by the defendant were in English. The defendant submitted these statements must be translated into Bahasa Melayu before the court. First, the defendant referred to O 92 r 1 of the ROC in support of this contention. It states as follows:

1 Language of documents (O 92 r 1)

(1) *Subject to para (2), any document required for use in pursuance of these rules shall be in the national language* and may be accompanied by a translation thereof in the English language, except that the translation for the purpose of O 11 r 6(4) and r 7(1) shall be prepared in accordance with r 6(5) of that order:

Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

(2) For Sabah and Sarawak, any document required for use in pursuance of these rules shall be in the English language and may be accompanied by a translation thereof in the national language except that the translation for the purpose of O 11 r 6(4) and r 7(1) shall be prepared in accordance with r 6(5) of that order. (Emphasis added.)

[45] The defendant also referred to s 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) as to the meaning of 'national language'. This statutory provision states as follows:

'National Language' means the national language provided for by art 152 of the Federal Constitution.

[46] In turn, art 152 of the Federal Constitution states as follows:

(1) The national language shall be the Malay language and shall be in such script as Parliament may by law provide ...

[47] The defendant also referred to s 8 of the National Language Act 1963/67 (Revised 1971) in support of her contention on this point. The statutory provisions states as follows:

All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any subordinate court shall be in the national language:

Provided that the court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

[48] Referring also to the Court of Appeal case of *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41, the defendant reiterated the importance of the translation and quoted Abdul Malik Ishak JCA (as he then was) in this case who said as follows:

[49] The importance of the Malay language as the national language cannot be taken lightly. Indeed Nik Hashim JC (later FCJ) in *Zainun Bte Hj Dahan lwn Rakyat Merchant Bankers Bhd & Satu Lagi* [1998] 1 MLJ 532 at pp 535–536, emphasised the usage of the Malay language in our courts in these erudite terms:

Pemfailan 'notice of motion' ini dalam bahasa Inggeris bukan sahaja menyalahi A 92 k 1 KMT malah ia juga melanggar s 8 Akta Bahasa Kebangsaan 1963/1967 ('Akta tersebut) yang memperuntukkan:

Segala prosiding (selain daripada pemberian keterangan oleh seseorang saksi) dalam Mahkamah Agung, Mahkamah Tinggi atau mana-mana mahkamah rendah hendaklah dalam bahasa kebangsaan:

Dengan syarat bahawa mahkamah boleh, sama ada atas kehendaknya sendiri atau atas permintaan mana-mana pihak dalam mana-mana prosiding dan selepas menimbangkan kepentingan keadilan dalam prosiding itu, memerintahkan supaya prosiding itu (selain daripada pemberian keterangan oleh seseorang saksi) dijalankan sebahagiannya dalam bahasa kebangsaan dan sebahagiannya dalam bahasa Inggeris.

Penggunaan Bahasa Melayu di mahkamah tidak boleh dipermudahkan dan diambil ringan. Perlembagaan Persekutuan menetapkan bahasa kebangsaan negara ialah Bahasa Melayu (perkara 152). Dengan peruntukan undang-undang di atas, maka keraguan atas penggunaan Bahasa Melayu dalam prosiding

mahkamah tidak boleh dipersoalkan lagi. Jadi, penggunaannya hendaklah dilaksanakan dengan ketatnya oleh semua pihak. Mahkamah hendaklah memainkan peranannya dengan melaksanakan kuasanya dengan sewajarnya. Kaedah-kaedah mahkamah termasuk A 92 k 1 adalah digubal bukan untuk hiasan tetapi untuk dipatuhi supaya prosiding di mahkamah dapat berjalan dengan sempurna. Ketakpatuhan kepada peraturan atau kaedah-kaedah mahkamah akan membawa prosiding di mahkamah menjadi kelam kabut (*Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420; [1993] 3 CLJ 629).

Permohonan melalui notis usul bukan suatu perkara yang susah atau rumit untuk dibuat dalam Bahasa Melayu. Dalam kes ini, 'notice of motion' sengaja dibuat dan difailkan bersekali dengan afidavit serta pernyataan dalam bahasa Inggeris tanpa memperdulikan peruntukan A 92 k 1 KMT, Akta tersebut dan Perlembagaan Persekutuan. Tidak ada sebab mengapa permohonan ini tidak boleh dibuat dalam Bahasa Melayu. Teks yang sahih ialah teks dalam Bahasa Melayu. Sekiranya mahkamah tidak berwaspada dan bertindak dari awal, sudah tentu lampiran 3 ini akan 'terlepas' dan pendengaran permohonan diteruskan tanpa mematuhi kaedah tersebut. Ketakpatuhan undang-undang tidak boleh dibiarkan. Permohonan di lampiran 3 adalah sungguh tidak teratur dan ia tidak boleh diterima dan dipertimbangkan oleh mahkamah sama sekali.

[50] We categorically say that the mandatory provisions of art 152 of the Federal Constitution read together with s 8 of the National Language Acts, 1963/1967 (Act 32) and s 3 of the Interpretation Acts 1948 and 1967 (Act 388) must be adhered to. It requires the appellant to file the memorandum of appeal in the national language. No other language will be entertained. And the failure of the appellant to do so amounts to a blatant breach which would compel us to conclude that no memorandum of appeal has been filed at all. The purported memorandum of appeal in the English language must accordingly be rejected outright without further ado. What is mandatory, must be strictly adhered to. Otherwise dire consequences would follow.

[51] Indeed the salutary advice of Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120 at p 121, must be heeded. There His Lordship said:

> There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.
>
> It should I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause ((sic) (course)) of speedy and efficient administration of justice.

[52] We observe that the word 'shall' appears in s 8 of the National Language Acts, 1963/1967 (Act 32). Likewise, the word 'shall' also appear in rr 18(1) and 101 of the Rules of the Court of Appeal 1994. It is quite obvious that the use of the word 'shall' raises a presumption that the particular provision is imperative (*State of Uttar Pradesh v Manbodhan Lal Srivastava* [1958] SCR 533 and *Manbodhan Lal*

A *Srivastava v State of UP* AIR 1957 SC 912 at p 917; *State of Uttar Pradesh v Babu Ram* AIR 1961 SC 751 at p 765; *M/s Sainik Motors, Jodhpur & Ors v State of Rajasthan* AIR 1961 SC 1480 at p 1485; and *Govind Lal Chaggan Lal Patel v The Agriculture Produce Market Committee & Ors* AIR 1976 SC 263 at p 267), and it is also ordinarily mandatory. It is also correct to say that when a statute uses the word
B 'shall', prima facie it is mandatory. And once it is held to be mandatory, the failure to comply with it will invalidate anything done under the statute.

[53] Thus, the failure on the part of the appellant to file a memorandum of appeal in *Bahasa Malaysia* renders the purported record of appeal filed by the appellant useless. It will not qualify as a record of appeal. It is our judgment that there is no
C proper or competent appeal before us.

[49] In the defamation case of *Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors* [1997] 5 MLJ 523, Zainun Ali JC (later FCJ) held as follows:

D The authorities are manifest in their approach that it is fundamental that the exact words as uttered (by the first defendant in this case) *must be reproduced in the original language with a certified translation in the language of the court,* in the absence of which the claim will fail. (Emphasis added.)

E **[50]** The statutory provisions and case law authorities as narrated above, relied upon by the defendant on this point are quite clear in requiring such translation to be made by the plaintiffs. These are cogent authorities supporting the defendant's contention that the alleged defamatory statements must be translated into Bahasa Melayu.
F

[51] In turn, the plaintiffs submitted that although there was no translation into Bahasa Melayu in respect of the defamatory statements, they could still use exhibits which are in English without translation into Bahasa Melayu. In this
G regard, they specifically referred to O 92 r 1(4)(b) of the ROC which states as follows:

... any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

H **[52]** With respect to the plaintiffs, the above reference is only on exhibits. It does not at all refer to pleadings. In the 'penyataan tuntutan terpinda' the plaintiffs did not translate the alleged defamatory statements into Bahasa Melayu. Considering the statutory provisions and case law authorities alluded
I to earlier, this would be fatal against the plaintiffs. As a consequence, the submission of the defendant on this point should be accepted.

CONCLUSION

[53] As narrated, the learned HCJ was not functus officio with respect to her decision to strike out the plaintiffs' claim and subsequently cancel that decision. Therefore, the first ground of appeal is decided in the plaintiffs' favour. The plaintiffs' arguments are also partly accepted with regard to the second ground of appeal. With regard to this ground, the plaintiffs' claim on libel is allowed. However, the plaintiffs did not prove their claim for malicious falsehood. With respect to the third ground of appeal, the learned HCJ should have allowed the defendant to call witnesses. The fourth ground of appeal is also decided for the defendant because the alleged defamatory statements must be translated into Bahasa Melayu.

[54] A disturbing feature of this case is the fact that the defendant was not allowed to call witnesses in defending the claim of the plaintiffs and also in proving her own counterclaim. Our determination on the four grounds of appeal, especially the second ground, could well be different had the defendant been allowed to call witnesses for the full trial. The whole complexion of the case too could very well have changed if the defendant had been allowed to call witnesses by the learned HCJ. We have already explained our reasons why this drastic action of the learned HCJ, not to allow the defendant to call witnesses, with respect, is both inappropriate and unfair. Not to be forgotten is the fact that the learned HCJ did not write her grounds of judgment. This, in no small measure, again with the utmost respect to the learned HCJ, is unfair and prejudicial to the plaintiffs and defendant. Without the grounds, it is also difficult for us to hear the appeal effectively.

[55] In the interest of justice and considering the circumstances of this case, we are unanimous in ordering a retrial of the plaintiffs' claim and the defendant's counterclaim.

Retrial of the plaintiffs' claim and the defendant's counterclaim ordered.

Reported by K Selvaraju